UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, DISTRICT 70 and LOCAL LODGE 839 (Spirit AeroSystems)

And **Case 14-CB-133028**

RYAN KASTENS, an Individual

And

SPIRIT AEROSYSTEMS, INC.

RESPONDENTS' REPLY TO COUNSEL FOR THE GENERAL COUNSEL'S OPPOSITION TO RESPONDENTS' MOTION TO STRIKE ERRATA AND AMENDED DECISION, AND RESPONDENTS' RESPONSE TO MOTION TO CORRECT THE ORIGINAL DECISION

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Respondents International Association of Machinists and Aerospace Workers, AFL-CIO, District 70 and Local Lodge 839 file their reply to Counsel for the General Counsel's *Opposition to Respondents' Motion to Strike Errata and Amended Decision* and their response to Counsel for the General Counsel's *Motion to Correct the Original Decision* as follows.

Reply to Counsel for the General Counsel's Opposition to Respondents' Motion to Strike Errata

I. The Administrative Law Judge's Creation of a Back Pay Remedy by Errata Was Not a Correction of an Obvious Omission

As addressed in *Respondents' Motion to Strike Errata and Amended Decision*, an Administrative Law Judge (*ALJ*) is not authorized to issue an erratum in order to make substantive changes to his original decision. "Under [the Board's Rules] Secs. 102.35 and 102.45 . . . [the] judge is authorized to issue post-decisional errata to correct material typographical errors, but not to change matters of substance, such as findings on the merits." *Wilco Business Forms*, 280 NLRB 1336, 1337 n. 2 (1986). *See also* NLRB Bench Book § 2-300 (Aug. 2010).

In response to the motion, Counsel for the General Counsel incorrectly asserts that the ALJ complied with these rules when he issued his May 5, 2015 *Errata* and *Amended Decision* because the errata merely corrected obvious omissions and did not in any way change the substance of the decision. This argument is based on the claim that a back pay remedy is the "usual and appropriate remedy" for an 8(b)(2) violation and that because Administrative Law Judge Michael Rosas found a Section 8(b)(2) violation, the Charging Parties are automatically entitled to back pay and the ALJ must have forgotten to include it in the original Decision and Order. GC's Response at 2.

An ALJ's determination that a charging party is entitled to a particular remedy certainly constitutes a conclusion of law, however, so ordering a back pay remedy through issuance of

errata drastically changed the substance of the original decision and even conflicted with the original findings. In his original decision, the ALJ never stated, or even suggested, that the Charging Parties were entitled to a make-whole remedy of back pay. There is no discussion of back pay whatsoever in the ALJ's analysis and conclusions, in his recommended order, or in his proposed notice posting.

In all past cases where the Board has found that a modification through errata was simply a correction of an obvious omission, the ALJ's findings and conclusions in the original decision made the omission apparent, and the amended decision was consistent with the original decision. *See, e.g., Daniel Construction Co*., 239 NLRB 1335 fn. 2 (1979) (errata corrected notice posting to include back pay obligation, but the back pay obligation was already set forth in the remedy section of judge's decision and his recommended order, so no substantive change was made).

In this case, there is no indication in the ALJ's original decision that he intended to order back pay but simply forgot to do so.[1] Indeed, the changes made through the errata plainly conflict with the ALJ's previous findings. In the original decision, ALJ Rosas found that the employer had good cause to discharge both Charging Parties, stating: "Neither Kastens (Tr. 195-197) nor Lehman (Tr. 268-270) disputed the credible testimony of company officials Justin Welner (Tr. 514, 517) and Jason Neal (Tr. 279-280) that the forwarding of the accident video and the taking of a 'selfie' photograph in the workplace violated the Company's rules and policies relating to privacy and security concerns, and subjected them to outright termination." (ALJD 7 n.41)

Section 10(c) of the Act bars the remedies of back pay and reinstatement when an employee has been discharged for cause. Because ALJ Rosas had already found that the

[1] The ALJ's original intent regarding the remedies to be granted is immaterial here. The rule is straightforward: an ALJ may not use errata to change the substance of his original decision. No analysis of the ALJ's state of mind at the time he issued the errata is necessary or appropriate.

Charging Parties were discharged for cause, the only reasonable conclusion is that the ALJ did not intend to impose a remedy was not available under the Act. By ordering back pay in the *Amended Decision*, the ALJ changed the substance of the original decision just as the errata in *Wilco* substantively changed the decision. The post-errata *Amended Decision* is irreconcilable with the ALJ's findings in the original decision. Accordingly, the Board should strike the *Errata* and *Amended Decision*.

II. The Administrative Law Judge's Original Decision and Order Included All Available Remedies for the Alleged Violation of Section 8(b)(2) Since the Back Pay Remedy Is Barred

Counsel for the General Counsel asserts in his response that the ALJ's errata "merely corrected the obvious omission of *any* remedy for the Section 8(b)(2) violation." GC's Response at 2 (emphasis in original). But this assertion mischaracterizes the original remedy. Indeed, the ALJ did order all remedies available for the alleged Section 8(b)(2) violation including a cease and desist order and a notice posting which addressed the alleged violation. *See* Original ALJD 17:11-14 ("Cease and desist from [a]ttempting to cause or causing Spirit Aerosystems to discharge employee-members because of their dissident union and/or other protected concerted activities"); *id.* at 19 ("WE WILL NOT attempt to cause or cause Spirit Aerosystems to discharge you because you engage in dissident union and/or other protected concerted activities.").

As discussed in Respondents' *Motion to Strike Errata and Amended Decision*, Section 10(c) of the Act absolutely bars the remedy of back pay when an employee is discharged for cause. *See* 29 U.S.C. § 160 ("No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause."). Here, the ALJ determined

that both Ryan Kastens and Jarrod Lehman were discharged for cause. (ALJD 7 n.41) Thus, a back pay remedy is not available and the ALJ ordered all available remedies in his original decision. The errata changed the substance of the decision and contravened controlling precedent.[2]

Response to Counsel for the General Counsel's Motion to Correct the Original Decision

Counsel for the General Counsel has requested, in the alternative, that the Board "correct" the ALJ's original decision by modifying the decision and awarding a back pay remedy for Kastens and Lehman. The Board should deny this motion summarily because there is no evidentiary basis for such a remedy. The back pay remedy is barred, so any back pay order would conflict with the ALJ's findings and conclusions in his original decision.

Section 10(c) provides in relevant part: "No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause." 29 U.S.C. § 160. This applies to both employers and labor organizations that have been charged with a violation. *Id. See also Taracorp Inc.,* 273 NLRB 221, 222 (1984) ("an employee discharged or disciplined for misconduct or any other nondiscriminatory reason is not entitled to reinstatement and back pay even though the employee's Section 7 rights may have been violated"). The House Report discussing Section 10(b) stated that this language "forbids the

[2] As a final note, Counsel for the General Counsel alleges in his response that through their motion to strike errata, Respondents are attempting to circumvent the Board's Rules and Regulations relating to timeliness and length of briefs in support of exceptions. It is correct that Respondents filed exceptions to the ALJ's improper use of the errata procedure to modify the substance of his original decision as well as to the order of back pay. (Respondents' Exceptions to the Decision and Order of the Administrative Law Judge, Exception Nos. 64, 65, 67) But a motion to strike is the proper procedural vehicle to challenge a substantive change made to the decision by the ALJ after his original decision has issued. *See Wilco*, 280 NLRB No. 154 n.2 (Board granted Respondent's motion to strike judge's errata). And Counsel for the General Counsel has filed his own post-briefs motion to "correct" the ALJ's original decision.

Board to reinstate an individual unless the weight of the evidence shows that the individual was not suspended or discharged for cause," H.R. Rep. 80-245 at 42 (1947), reprinted in 1 LMRA Hist. 333, regarding H.R. 3020, 80th Cong. (1947).

In the instant case, there is no question that Kastens and Lehman were discharged for good cause. On January 27, 2014, Lehman sent an e-mail from his work account titled *Why you should always look both ways* to nine separate e-mail addresses, including two e-mails which were directed to individuals outside of Spirit AeroSystem's e-mail system. (GC Ex. 8 at 5). Lehman noted the location of the subject incident in the body of the e-mail as *MacArthur crossing Wichita, Ks*. and he attached a confidential security video recorded by a closed circuit camera that was directed toward an intersection of two gated entrances to the plant. (GC Ex. 8; Jt. Ex. 20)

The video showed a collision between a truck and a Spirit scooter on December 26, 2013. (Jt. Ex. 20) The driver of the scooter was a unit employee in the Maintenance Department. Lehman confirmed that the video had a date and time stamp reflecting the date of the collision, which indicated that the video was captured from a camera such as a security or traffic camera. (Tr. 249:23-250:12) Lehman sent the e-mail and attachment to Kastens, who soon forwarded it to approximately 71 separate e-mail addresses, 11 of which were external to Spirit's e-mail system. (GC Ex. 8 at 3-6; Tr. 194:20-195:6) The confidential video was rapidly disseminated in the plant as a result of Lehman and Kastens's e-mails.

By forwarding this confidential security video, Lehman and Kastens violated several policies maintained by Spirit governing the use of electronic mail and the release of Company information. The Company's Acceptable Use Policy, designated as OP15-810, provided in pertinent part: "Users shall not provide Spirit information to parties outside Spirit, unless

authorized by the information owner and Communications." (Jt. Ex. 11 at 7) The policy states that employees who use their personal e-mail accounts "must ensure that personal e-mail does not adversely affect the company or its public image or that of its customers, partners, associates or suppliers" and further ensure that any personal use of Spirit computer resources "would not cause embarrassment to the company." (Jt. Ex. 11 at 11, 15) It also provided that sensitive and proprietary information may only be transferred within the Company's secure server and not by public e-mail systems. (Jt. Ex. 11 at 15)[3]

Justin Welner, Vice President of Human Resources, and Jason Neal, Senior Manager of Security, testified that the policies violated by Kastens and Lehman were designed to protect the employer's proprietary interests as well as to protect the privacy and security of both Spirit and its employees. (Tr. 283:20-22; 284:14-15, 514:7-20) Under the Company's Disciplinary Guidelines, violations of these policies warranted summary termination in the first instance. (Jt. Ex. 14 at 7) (*Unacceptable Behavior – 1st Offense, termination,* Section 3.4L) Welner testified that Spirit has consistently discharged other employees for the same or similar first-time terminable offenses. (Tr. 517:6-15)

Significantly, both Charging Parties admitted at hearing that they had committed misconduct that violated the employer's conduct policies and that they were subject to immediate discharge for cause. Kastens admitted that his use of Spirit's computer resources and e-mail system to transmit the security video violated the internet and e-mail policies, and that external disclosure of the video to people who were not employees also violated Company policy. (Tr. 196:22-197:3; 195:2-9) Lehman also admitted that his disclosure of the video

[3] *See also* Jt. Ex. 13 (*Release of Information Outside Spirit AeroSystems* (OP2-17), which delineated a number of criteria which must be met before any Spirit information was distributed outside the Company); Jt. Ex. 12 (policies and rules prohibiting auto-forwarding of e-mails and requiring encryption of any information which, if disclosed, could harm Spirit's competitive position or damage its reputation, among other provisions).

violated Company policy and that such severe misconduct called for summary discharge under Section 3.4L of the Disciplinary Guidelines. (Tr. 268:7-13; 269:23-270:8)

In view of these undisputed facts, ALJ Rosas made a finding that the employer had good cause for discharge, stating: "Neither Kastens (Tr. 195-197) nor Lehman (Tr. 268-270) disputed the credible testimony of company officials Justin Welner (Tr. 514, 517) and Jason Neal (Tr. 279-280) that the forwarding of the accident video and the taking of a 'selfie' photograph in the workplace violated the Company's rules and policies relating to privacy and security concerns, and subjected them to outright termination." (ALJD 7 n.41)

In light of the statutory bar on back pay or reinstatement, ALJ Rosas provided the Charging Parties with all available remedies for the alleged violation of Section 8(b)(2) in his original decision: a cease and desist order (ALJD 17:11-14) and a notice posting addressing the alleged violation (ALJD 19). The ALJ did not err by choosing not to order a back pay remedy, and no amount of "corrections" to the ALJ's original decision can change the fact that both individuals were discharged for cause. The inclusion of a back pay order would violate the express language of the Act, and it would conflict with the ALJ's findings in his original decision and the conclusive evidence of record. Accordingly, the Board should deny Counsel for the General Counsel's motion.

Conclusion

The Board should grant Respondents' motion to strike the Administrative Law Judge's *Errata* and *Amended Decision*, and overrule Counsel for the General Counsel's *Motion to Correct the Original Decision* in its entirety.

Dated August 13, 2015.

Respectfully submitted,

/s/ Rod Tanner
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Certificate of Service

The undersigned attorney certifies that on August 13, 2015, he served the foregoing document on the Board, Office of the Executive Secretary, Region 14/Subregion 17, and Counsel for the General Counsel via electronic filing and on the parties listed below via electronic mail.

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